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IN THE

SUPREME COURT OF THE UNITED STATES.

No. .

October Term, 1955.

SAMUEL ANDREW LINDSTROM, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Samuel Andrew Lindstrom, Sr., by his attorneys, Edward J. Mingey, Jr., Joseph F. McVeigh, Francis J. Myers and Cornelius C. O'Brien, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered June 3, 1955.

OPINION BELOW.

The opinion of the Court of Appeals is not reported at this time but appears at page 7, infra.

JURISDICTION.

The Judgment of the Court of Appeals was entered on June 3, 1955. The Order of the Court of Appeals denying rehearing was entered June 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether a jury in a criminal case may infer guilt from the failure of a defendant to testify on his own behalf.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment V to the Constitution of the United States.

> * * * nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *.

Act of June 25, 1948, c. 645, 62 Stat. 833, 18 U. S. C. 3481.

> In trial of all persons charged with the commission of offenses against the United States and in all proceed-

ings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

STATEMENT.

Petitioner was charged, together with his son, in two indictments, each containing three counts, with having wilfully and knowingly attempted to defeat and evade part of his income tax liability for the calendar years 1947, 1949 and 1950, by having filed false and fraudulent income tax returns in violation of Section 145(b) of the Internal Revenue Code of 1939 (R. 3a to 7a).

The causes were consolidated and tried before a District Judge of the United States District Court for the Eastern District of Pennsylvania, at Philadelphia, and a jury. At the close of the government's case, motions for judgments of acquittal were denied. Defendants offered no evidence and did not testify at the trial. The jury returned verdicts of guilty on all counts of both indictments on December 21, 1953. Defendants duly renewed their motions for judgments of acquittal which were denied by District Judge Thomas J. Clary in an opinion filed July 22, 1954 and reported in 122 F. Supp. 518 (R. 140a to 148a).

Both defendants filed appeals from the judgments of conviction, which appeals were consolidated and argued before the Court of Appeals on April 7, 1955.

The Court of Appeals on June 3, 1955 entered its judgments and opinion reversing the judgment of conviction as to petitioner's son, and remanding that cause with directions to enter a judgment of acquittal, and affirming the judgment as to petitioner (p. 7-13, infra).

Petitioner filed a petition for rehearing which was denied

by the Court of Appeals on June 27, 1955 (p. 14, infra).

In its opinion affirming the judgment as to conviction of petitioner, the Court of Appeals properly held that "mere proof of understatement of taxable income without other evidence of wilfullness is insufficient to support a conviction under Section 145(b)" (p. 9, infra). The Court further held, however, that there was such other evidence of wilfullness on the part of petitioner in that petitioner maintained two individual bank accounts of which his bookkeeper kept no record (p. 9-10, infra). Petitioner's income tax returns for the years in question were prepared not by the bookkeeper, but by his accountant, who was physically incapable of testifying at the trial. It was contended on behalf of petitioner that the evidence clearly established that the accountant who prepared the returns had full and complete information respecting the aforesaid individual bank accounts of petitioner.

The Court of Appeals stated:

> "Deady was, as we have said, physically incapacitated from testifying. The only other possible witness to the fact, Lindstrom, Senior, himself, did not testify. Under these circumstances the jury could fairly infer that the understatement of income by Deady in the returns which he prepared was the result of Lindstrom, Senior, not having given him the data he needed from the two outside bank accounts."

(p. 10-11, infra).

REASONS FOR GRANTING THE WRIT.

The record in this case and the opinion of the Court of Appeals establish the following facts beyond peradventure of doubt:

1. Since the causes were consolidated for trial, all of the evidence, except that pertaining to the two individual bank

accounts of petitioner, was applicable with equal force to petitioner and to his son.

2. The sum total of all of the evidence, except that with respect to the two individual bank accounts of petitioner, was insufficient to support the judgment of conviction as to petitioner's son.

3. The sum total of this same evidence, excluding that with respect to the two individual bank accounts of petitioner, was also necessarily insufficient to support the judgment of conviction as to petitioner.

4. The only evidence of wilfullness on the part of petitioner, in addition to the understatement of taxable income (which, of itself, is concededly insufficient to support a conviction) is the evidence that petitioner had two individual bank accounts.

5. There is no evidence that any deposits in these accounts which represented income were not reported on the partnership income tax return or reflected in petitioner's individual return.

6. The affirmance of petitioner's conviction by the Court of Appeals was predicated on the proposition that the jury could fairly infer petitioner's guilt from the fact that his accountant, who could not testify at the trial, and petitioner, who did not testify at the trial, failed to offer any explanation respecting the said bank accounts.

The Court of Appeals accordingly held that an inference of guilty knowledge might be drawn against petitioner because he did not testify. Such an inference is not permissible under the law. *Bradford, et al. v. United States,* C. C. A. 5, 130 F. 2d 630, cert. den. 317 U. S. 683, 87 L. ed. 547; Cf. *Bruno v. United States,* 308, U. S. 287, 84 L ed. 257.

A defendant is not required under the law to take the

witness stand He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact. *Caminetti v. United States,* 242 U. S. 470, 493, 494, 61 L. ed. 442, 456; 18 U. S. C. A. 3481.

There being no basis for any inference of guilt on the part of petitioner other than his failure to take the stand in his own behalf, the holding of the Court of Appeals to the effect that such an inference of guilt could fairly be drawn by the jury from petitioner's failure to testify, has denied petitioner the protection afforded him by the Fifth Amendment to the Constitution of the United States and the applicable Act of Congress, 18 U. S. C. 3481.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

EDWARD J. MINGEY, JR.,
JOSEPH F. McVEIGH,
FRANCIS J. MYERS,
CORNELIUS C. O'BRIEN,
Attorneys for Petitioner.

July, 1955.

APPENDIX.

OPINION OF THE COURT.

(Filed June 3, 1955.)

By Maris, Circuit Judge.

The defendants, Samuel Andrew Lindstrom, Senior, and Samuel Andrew Lindstrom, Junior, were found guilty by a jury in the District Court for the Eastern District of Pennsylvania of wilfully and knowingly attempting to defeat and evade income tax for the years 1947, 1949 and 1950 in violation of section 145(b) of the Internal Revenue Code of 1939. They both moved for judgments of acquittal in the District Court which were denied. Each has appealed to this Court asserting that the evidence was insufficient to support the jury's finding of wilful intent to defeat and evade the tax. The facts are fully stated in a careful opinion filed in the district court by Judge Clary. 122 F. Supp. 518. It is sufficient here to say that the Government's testimony, which was not controverted by the defendants, established the following significant facts:

The defendants, father and son, were equal partners in a business in Lansdowne, Pennsylvania, known as S. A. Lindstrom & Son, involving the erection of structural steel. They also engaged in the rental of construction equipment and the sale of such equipment. In carrying on their business the defendants used five bank accounts, two in the Lansdowne National Bank, one in the Clifton Heights National Bank in Clifton Heights, Pennsylvania, one in the Corn Exchange National Bank in Philadelphia, and one in the Ventnor National Bank in Ventnor, New Jersey. All of these accounts were carried in the individual name of Lindstrom, Senior, except one in the Lansdowne National Bank which was carried in the firm name.

The defendants customarily deposited the receipts of the steel erection business in the firm account in the Lansdowne National Bank and in the account in the Clifton Heights National Bank, the deposits in the latter account being of funds to be disbursed as payroll taxes. Most of the receipts from the rental of equipment were deposited in Lindstrom, Senior's, individual account in the Lansdowne National Bank. Some of these receipts, however, and receipts from the sale of equipment were deposited in Lindstrom, Senior's, individual accounts in the Corn Exchange National Bank and the Ventnor National Bank.

Prior to 1941 the accounts of the firm were kept by Frank Deady, an accountant. In that year the firm employed Regina Lindstrom, the widow of a deceased son of Lindstrom, Senior, as bookkeeper and she kept such accounts as were kept during the period here in question. These consisted of cash receipts and disbursements, accounts payable and payroll books for the steel erection business reflecting the transactions included in the firm bank account in Lansdowne and the individual bank account in Clifton Heights. In addition the bookkeeper kept in the check books of Lindstrom, Senior's individual account in the Landsdowne National Bank a record of the equipment rentals deposited in that account. The bookkeeper also when directed to do so by Lindstrom, Senior, made deposits of equipment rental and sales receipts in his account in the Corn Exchange National Bank but kept no records of that account and had nothing whatever to do with his account in the Ventnor National Bank.

Deady, the accountant who had formerly kept the books, continued to prepare the defendant's income tax returns during the years here in question. In this connection Mrs. Lindstrom furnished him with the books and records of the steel erection business which she kept and the check books covering the two accounts in the Lansdowne National Bank and the account in the Clifton Heights National Bank, the information, if any, which Deady received regarding these accounts being furnished him by Lindstrom, Senior.

The Bureau of Internal Revenue commenced an investigation of the defendants' income tax liability in February 1951 and discussed the matter with Deady, who on May 31st suffered a cerebral hemorrhage and was thereafter unable to cooperate. The defendants in August, 1951 retained Clement W. Bowen, a certified public accountant, to assist in establishing their tax liability. When he started his audit Mrs. Lindstrom gave him the same records she had furnished Deady but did not tell him of the Corn Exchange and Ventnor accounts. It was not until November 1951 that Bowen learned from Lindstrom, Junior, of those two accounts. He was then able to complete his analysis of the defendants' tax liability and his figures agreed substantially with those of the Bureau in indicating an understatement of partnership net income of approximately $100,000 for 1947, $20,000 for 1949 and $30,000 for 1950. These discrepancies were due partly to understatements of income and partly to overstatements of expense.

The charge made against these defendants is that they wilfully and knowingly attempted to defeat and evade income tax in violation of section 145(b) of the Internal Revenue Code of 1939. They strongly urge that the evidence established merely that their taxable income was understated in their returns but not that they wilfully attempted to evade income tax thereby. Admittedly mere proof of understatement of taxable income without other evidence of wilfullness is insufficient to support a conviction under section 145(b). But we think that as to Lindstrom, Senior, there was in this case other evidence which was sufficient to support a finding by the jury that the understatement was wilful and knowing on his part. For here we have the evidence that a keen, experienced and successful business man withheld the receipts of a substantial portion of the business from being deposited in the bank account handled by the firm bookkeeper or entered by her in the business records which she kept and which were made available to the firm's account, Deady, for the preparation of income tax

returns. Moreover, the evidence is clear that these particular business receipts were deposited by Lindstrom, Senior, or at his express direction in two individual bank accounts of his own, of which the bookkeeper kept no record whatever, one of them in Philadelphia and the other in Atlantic County, New Jersey.

The defendants argue that the inference of wilfullness which might be drawn from these facts is negatived by evidence that Lindstrom, Senior, himself turned over to Deady the information with respect to these two bank accounts which was needed for the preparation of accurate income tax returns. We cannot agree that there was such evidence, however. The only evidence on the subject was that of Mrs. Lindstrom, the bookkeeper. As to the effect of her testimony we are in complete accord with the following statement by Judge Clary (122 F. Supp. at 522):

> "The defendants attempt to minimize the effect of this testimony by placing great reliance on the volunteered statement of Mrs. Regina Lindstrom, the bookkeeper, that the information about the two bank accounts was given to Deady by Lindstrom, Sr. Unfortunately, her testimony in that regard does not establish as a fact that Lindstrom ever gave any information about the accounts to Deady. The net effect of her testimony is that whatever information Deady had about these accounts had to come from the Lindstroms because she knew nothing about them herself. Whether Deady ever received any information about them or knew of their existence is in the state of the record extremely doubtful. In the present state of the record nobody has stated positively that Deady was informed of the existence of these bank accounts."

Deady was, as we have said, physically incapacitated from testifying. The only other possible witness to the fact, Lindstrom, Senior, himself, did not testify. Under these

circumstances the jury could fairly infer that the understatement of income by Deady in the returns which he prepared was the result of Lindstrom, Senior, not having given him the data he needed from the two outside bank accounts. The case as to Lindstrom, Senior, thus comes squarely within the rule, as recently restated by the Supreme Court in Holland v. United States, 1954, 348 U. S. 121, 139, as follows:

> "A final element necessary for conviction is wilfulness. The petitioners contend that wilfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of wilfulness, their verdict must stand. Spies v. United States, * * * (317 U. S. 492) at 499-500."

As to Lindstrom, Junior, the case is quite different, however. For the evidence is that the equipment rental and sale portion of the business was carried on by his father and there is no evidence that he had anything whatever to do with the individual bank accounts of his father in which the receipts of those business activities were deposited. There is, therefore, in his case nothing more shown than that his returns understated his taxable income; not enough, as we have said, to support a finding of a wilful attempt to evade tax. His motion for a judgment of acquittal should therefore have been granted.

In No. 11,508, the judgment of the district court will be reversed and the cause remanded with directions to enter a judgment of acquittal.

In No. 11,509, the judgment of the district court will be affirmed.

A true Copy:
Teste,

Clerk of the United States
Court of Appeals for the
Third Circuit.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,509.

UNITED STATES OF AMERICA
vs.
SAMUEL ANDREW LINDSTROM, SR.,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PRESENT:
MARIS and HASTIE, Circuit Judges, and WILLSON, District Judge.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

June 3, 1955.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,509.

UNITED STATES OF AMERICA

vs.

SAMUEL ANDREW LINDSTROM, SR.,
Appellant.

SUR PETITION FOR REHEARING.

PRESENT:

MARIS and HASTIE, Circuit Judges and WILLSON, District Judge.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,
WILLIAM H. HASTIE,
Circuit Judge.

Dated: June 27, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 270

SAMUEL ANDREW LINDSTROM, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 122 F. Supp. 518. The opinion of the Court of Appeals (Pet. 7-12) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1955 (Pet. 13), and a petition for rehearing was denied on June 27, 1955 (Pet. 14). The petition for a writ of certiorari was filed on

July 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether the evidence of willfulness was sufficient to support the conviction.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On March 12, 1953, three-count indictments were returned against petitioner and his son, Samuel

Andrew Lindstrom, Jr., in the United States District Court for the Eastern District of Pennsylvania, charging them with having willfully attempted to evade and defeat a large part of their individual income taxes for the calendar years 1947, 1949 and 1950. (R. 1a, 3a-7a.) [1] The indictment involving petitioner charged the following deficiencies:

	Reported		*Corrected*	
Year	*Income*	*Tax*	*Income*	*Tax*
1947	($11,664.94)*	None	$37,793.12	$16,451.22
1949	17,353.68	$2,446.98	22,430.53	4,436.02
1950	8,059.39	908.08	18,285.73	3,340.20

* Reported net loss.

After a jury trial lasting approximately six days, both petitioner and his son were found guilty as charged. (R. 136a-137a.) On December 3, 1954, petitioner received a six months suspended prison sentence plus a fine of $7,500. (R. 149a-150a.) [2] The Court of Appeals affirmed petitioner's conviction but reversed as to his son because the evidence failed to show his participation in the scheme of evasion. (Pet. 7-12.)

During the years in question, petitioner and his son operated S. A. Lindstrom & Son as equal partners. The firm fabricated structural steel, conducted a crane rental service and periodically sold various types of heavy construction equipment. (R. 12a-13a, 17a.) The rental and equipment sales

[1] Record references herein are to page numbers of Consolidated Appendix for Appellants.

[2] Petitioner's son was sentenced to six months imprisonment plus a $3,000 fine.

activities were supervised exclusively by petitioner. (R. 17a.) The business' books and records were kept by petitioner's daughter-in-law, Regina Lindstrom. (R. 21a.) She furnished these records to an accountant, Deady, who prepared the tax returns for both the partnership and the individual partners. (R. 21a-23a.)

Business receipts were deposited in four bank accounts, three of which were in petitioner's name and one in the name of the partnership. (R. 15a, 17a, 93a.)[3] Deposits made by petitioner, or by Regina Lindstrom pursuant to his direction, to two of the accounts in his name were not recorded in the partnership books and records. (R. 16a.) When asked by Government counsel whether she had ever given Deady any records or information relative to the two unrecorded accounts, Regina Lindstrom replied that she had had nothing to do with them. (R. 22a.)

In May, 1951, after the Internal Revenue Service had begun its investigation, petitioner and his son engaged a Certified Public Accountant, Bowen, to audit their tax affairs and, more particularly, to verify the income reported on their returns for the years here involved. (R. 49a-51a.) Bowen was unable to reconcile recorded income with that reported on the returns. (R. 60a.) He began his audit in August, 1951, at which time he was advised of the existence of the two bank accounts that were reflected by the partnership books and the account

[3] A fifth account, also carried in petitioner's name, was used primarily for payroll purposes. (R. 80a-81a.)

that was used for payroll purposes. (R. 53a.) Although Bowen thereafter had many conferences with petitioner, his son, and Regina Lindstrom, it was not until November, 1951, that he learned from petitioner's son of the existence of the two accounts not included in the partnership records. (R. 54a-55a.) Since these accounts contained deposit items of taxable income, their discovery necessitated a revision of Bowen's audit figures. (R. 59a, 62a-63a, 93a.) Bowen also discovered evidence of substantial overstatement of deductible expenses claimed on the returns. (R. 81a.) At the conclusion of his audit, Bowen's tax figures were in substantial agreement with those of the Bureau investigators. (R. 62a-63a.)

Petitioner sought to fix the responsibility for the acknowledged understatement on Deady, the theory being that he supplied the latter all information necessary to the preparation of correct returns, including the records pertaining to the two bank accounts not reflected by the partnership records. The bookkeeper testified that she had not given Deady those records. Deady, himself, was physically incapacitated and unable to testify at the time of the trial. Thus, the Court of Appeals observed (Pet. 10-11):

> The only other possible witness to the fact, Lindstrom, Senior, himself, did not testify. Under these circumstances the jury could fairly infer that the understatement of income by Deady in the returns which he prepared was the result of Lindstrom, Senior, not hav-

ing given him the data he needed from the two outside bank accounts.

ARGUMENT

While conceding the existence of unreported income, petitioner asserts that the evidence of willfulness was insufficient to sustain the verdict. Accordingly, he argues, the jury must have presumed the guilty knowledge requisite to conviction from his failure to testify. (Pet. 5-6.) The record does not support either of these contentions.

As the Court of Appeals noted in considering the argument, the evidence adduced at trial showed petitioner to be a highly experienced and successful businessman who diverted taxable income in substantial amount to two personal bank accounts not recorded in the business books from which the income tax returns of himself and his partnership were prepared. *Supra,* p. 4. This unchallenged evidence of unrecorded income coupled with petitioner's failure to declare as much as one-fifth of his true taxable income over a three year period furnished ample basis for the jury's conclusion that the understatements acknowledged by petitioner were motivated by a tax-evasion objective. *Holland* v. *United States,* 348 U. S. 121, 139. Certainly, the likely effect of petitioner's practice of depositing business receipts to his personal bank accounts was to mislead and conceal. *Spies* v. *United States,* 317 U. S. 492, 499. Thus, it is apparent that the jury's verdict was supported by substantial evidence on all essential elements of the offense charged.

The record contradicts petitioner's claim that the jury was permitted to infer willfulness from his failure to testify. On this point, the trial court's charge, described by petitioner as "very fair" (R. 135a), expressly admonished against the drawing of any inference unfavorable to the defense.[4] It must be presumed that the jury conscientiously observed the instructions of the court. *United States* v. *Harris,* 211 F. 2d 656, 659 (C. A. 7th), certiorari denied, 348 U. S. 822. The Court of Appeals' remarks concerning the significance of petitioner's failure to testify merely restated the fundamental proposition that once the Government has established its case, the defendant remains quiet at his peril. *Holland* v. *United States, supra,* pp. 138-139.

[4] "Members of the jury, in this case the defendants by their plea of not guilty have denied effectively, legally, every charge in these indictments, and they have put the Government to proof. The failure of these defendants to take the witness stand and testify in their own behalf does not create any presumption against them, and you must not permit that fact to weigh in the slightest degree against these defendants, nor can that fact ever enter into your discussions and deliberations in the jury room." (R. 130a-131a.)

CONCLUSION

The decision below is clearly correct and the petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
JOSEPH M. HOWARD,
GEORGE WILLI,
Attorneys,
Department of Justice.

AUGUST, 1955.

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